

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 24, 2008 Session

MILTON CARVER v. TOMBIGBEE TRUCKING CO. ET AL.

**Direct Appeal from the Chancery Court for McNairy County
No. 8246 Martha B. Brasfield, Chancellor**

No. W2007-01072-WC-R3-WC - Mailed July 22, 2008; Filed August 27, 2008

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. Employee suffered a compensable injury. The trial court found him to be permanently and totally disabled. Employer has appealed, contending that the evidence preponderates against the finding of permanent total disability. We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and DONALD P. HARRIS, SR. J., joined.

J. Arthur Crews, II, and P. Allen Phillips, Jackson, Tennessee, for the appellant, Tombigbee Trucking Company.

Ricky L. Boren, Jackson, Tennessee, for the appellee, Milton Carver.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael Moore, Solicitor General; Lauren S. Lamberth, Assistant Attorney General, for the appellee, The Second Injury Fund.

MEMORANDUM OPINION

Factual and Procedural Background

Milton Carver ("Carver") was a truck driver for Tombigbee Trucking Company ("Tombigbee"). He was injured on August 23, 2004, while moving a box that contained a bath tub

or shower unit that he was delivering to a store. He reported the injury immediately and was referred to Dr. Smelser. At that time, Carver's symptoms were neck pain, headaches, and numbness in his hands. Dr. Smelser provided conservative treatment and ordered an MRI, which showed a bulging disk. Carver was referred to an orthopaedic surgeon, Dr. Lloyd Johnson.

Dr. Johnson first saw Carver on October 22, 2004. His diagnosis was a cervical strain. He ordered EMG studies to address Carver's hand complaints. That test revealed a bilateral ulnar neuropathy, also known as cubital tunnel syndrome. Dr. Johnson provided conservative treatment for a period of time. He recommended surgery for the cubital tunnel syndrome, but Carver did not wish to undergo this procedure. In August 2005, Carver's care was transferred to Dr. Howell, a physiatrist. Dr. Howell prescribed pain medication and muscle relaxers. He treated Carver until December 2006. The records of Dr. Johnson and Dr. Howell were placed into evidence, but neither doctor testified.

Dr. Eric Beck, a physiatrist, testified by deposition. He performed an independent medical evaluation ("IME") at the request of Tombigbee. Dr. Beck opined that Carver retained impairments of 5% to each upper extremity. These impairments, when combined, converted to 6% to the body as a whole.¹ Dr. Beck did not assign any impairment for Carver's neck injury. He stated that he reached this conclusion because his examination did not reveal any muscle spasm or guarding in the neck. He ordered a Functional Capacity Evaluation. Based upon the results of that test, Dr. Beck recommended that Carver not lift more than ten pounds frequently and not more than fifteen pounds occasionally. He also advised that Carver should only occasionally engage in gripping, pinching and fingering, pushing and pulling. He placed no restrictions upon walking or standing.

Dr. Joseph Boals, an orthopaedic surgeon, performed an IME at the request of Carver's attorney. His diagnosis was a cervical strain that had aggravated pre-existing arthritis and bilateral ulnar neuropathy. He opined that Carver had a total impairment of 14% to the body as a whole; 8% of this impairment was for the neck injury and 6% for the elbow problems. He recommended that Carver avoid repetitive work and heavy gripping with both hands.

On the date of trial, Carver was fifty-eight years old. He had attended school through the eleventh grade and had no additional education. He had been a truck driver for approximately twenty-five years. Prior to becoming a truck driver, he had worked as a supermarket cashier/stocker, iron worker, factory worker, and meat cutter. He returned to work in a light duty capacity for several weeks after the injury occurred. This job involved reviewing driver logs to ascertain compliance with federal regulations. He was laid off from this position and was not recalled to work by Tombigbee. He had not worked since that time. Carver testified that he was unable to return to truck driving or any of the jobs he had previously held. He reported headaches, neck pain, and numbness in his hands. He testified that he chose not to have surgery on his elbows because he was

¹Dr. Beck initially assigned an impairment of 11% to the body as a whole. However, that rating was based upon the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment. He revised that rating to 6% in accordance with the Fifth Edition of the Guides.

“scared” of the procedure. At the time of trial, he was taking several medications for neck pain. He identified these as “Tramadol,” “Rebox,” “Lorcets,” and “Thermacure.” He testified that these caused him to be sleepy, dizzy, and light-headed. Neither Dr. Beck nor Dr. Boals testified concerning the medications prescribed for Carver or their effects. Dr. Howell’s office note of December 7, 2006, is the most recent medical note in the record. That note identifies Carver’s medications at that time to be “Thermacare patches,” “Ultram,” “Robaxin,” and “Lyrica.” There is no information in the record concerning the effects of these medications.

Carver has had three prior workers’ compensation claims. These claims were for injuries to his right arm and shoulder in 1985, his neck in 1994, and his left ankle in 1998 and resulted in settlements totaling 23.75% to the body as a whole. On cross-examination, he stated that he had neck pain after the 1994 injury. He did not recall having headaches after that injury but did not deny that these occurred. The trial court found that Carver was permanently and totally disabled. Liability was apportioned 76.25% to Tombigbee and 23.75% to the Second Injury Fund. The judgment states that the disability was apportioned pursuant to Tennessee Code Annotated section 50-6-208(b).² Tombigbee appeals, contending that the trial court erred in finding Carver to be permanently and totally disabled.

Standard of Review

Our standard of review of factual issues in a workers’ compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court’s factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002). When expert medical testimony differs, it is within the trial judge’s discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court’s conclusions. Gray v. Cullom Mach., Tool & Die, Inc., 152 S.W.3d 439, 443 (Tenn. 2004).

Analysis

Permanent total disability occurs when an injured employee is totally incapacitated “from working at an occupation that brings the employee an income.” Tenn. Code Ann.

²The record does not indicate that the trial court made a determination of the extent of disability resulting solely from the current injury. See Bomely v. Mid-America Corp., 970 S.W.2d 929, 934-35 (Tenn. 1998). However, no party has raised this as an issue on appeal.

§ 50-6-207(4)(B)(2005); see Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 535-36 (Tenn. 2006).

Tombigbee contends that Carver is not permanently totally disabled. Tombigbee points to Carver's brief period of light duty work after his injury as demonstrating his capability to perform less physical jobs than he had previously held. Tombigbee also notes the testimony of Dr. Beck that his restrictions would be "a good starting point" for Carver to determine his work capabilities. Tombigbee further points out that Carver voluntarily chose not to have corrective surgery on his elbows and implies that his level of disability would be less if the surgery had been performed.

In Sullivan v. Green, 331 S.W.2d 686, 693 (Tenn. 1959), the Supreme Court held as follows regarding an employee's refusal to undergo a hernia surgery:

In considering the question of the claimant's refusal to undergo a major operation of any kind where it is admitted to be a serious one, we think the viewpoint of the injured employee should be considered as well as the attending surgeons. Of course, his fear of the operation is not controlling, but we must consider realistically is such fear reasonably justified under all the facts.³

Dr. Boals testified that it was reasonable for Carver not to have surgery and it was unlikely that it was going to totally relieve his symptoms. Dr. Boals testified as follows:

He has had it for a long time now, and chances are they are not going to totally relieve him; But they could prevent progression of this if he is going to keep doing things to keep pressure on his elbow, and I would say it is reasonable for him not to have surgery and just accept what he has got; But he would have to back off a lot of the activities.

Therefore, considering the medical testimony, Carver's refusal to have surgery is reasonable.

Carver asserts that the effects of his medications limit his ability to work over and above the restrictions imposed by Dr. Beck. He also contends that his own testimony concerning his limitations provides a basis for the trial court's ruling. His primary work experience is driving a truck, which he is no longer able to do. His other work experience is remote in time and also consists of relatively unskilled, physical labor.

The evidence concerning Carver's intellectual ability is limited. He did not complete high school or take the GED test. His grades in school were "not very good." He was able to read and understand the information contained in the driver records that he reviewed during his brief period

³Although the employee in Sullivan was not required to undergo surgery to treat his hernia, the General Assembly has since determined that an employee who suffers a hernia injury will not receive compensation until he or she undergoes surgery. Tenn. Code Ann. § 50-6-212(b), (c)(1) (2005).

of light duty work. Neither side offered testimony concerning his overall IQ nor his ability to read or perform arithmetic.

Carver is an older worker. Most of his work experience has been in a single job of truck driver. His education is limited. The restrictions placed upon him by Tombigbee's IME physician effectively preclude him from driving a truck or performing any of the other jobs he has held in the past. He takes several medications that, by his account at least, have side effects that make driving to and from any potential job problematic. He has continuing symptoms that affect his activities of daily living.

The Workers' Compensation Act is remedial and is to be liberally construed in favor of the employee, and any reasonable doubt as to whether an injury arose out of and in the course of employment is to be resolved in favor of the employee. Martin v. Lear Corp., 90 S.W.3d 626, 629 (Tenn. 2002); Shubert v. Steelman, 377 S.W.2d 940, 943 (Tenn. 1964). With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court.

Considering all of these factors, we are unable to conclude that the evidence preponderates against the trial court's finding that Carver is permanently and totally disabled as a result of his work injury.

Conclusion

The judgment is affirmed. Costs are taxed to Tombigbee Trucking Company and its surety, for which execution may issue if necessary.

ALLEN W. WALLACE, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 24, 2008 Session

MILTON CARVER v. TOMBIGBEE TRUCKING CO., et al.

**Chancery Court for McNairy County
No. 8246**

No. W2007-01072-WC-R3-WC - Filed August 27, 2008

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the Appellant, Tombigbee Trucking Company, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM